

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES

In the Matter of the)
Complaint Against)
JUDGE JOHN WARNER, TOM)
OBERWEISER, KIM KIRBY,)
and the HAVRE DAILY NEWS)

SUMMARY OF FACTS AND STATEMENT OF FINDINGS

Mort Goldstein of Havre, Montana, in a complaint dated June 8, 1994, and filed with this office on June 13, 1994, alleges violation of Mont. Code Ann. § 13-35-233, solicitation of votes on election day, by district judge John Warner, Tom Oberweiser, Kim Kirby, and the Havre Daily News (Rick Weaver, Publisher). Mr. Goldstein contends that Judge Warner was responsible for the publication of several letters to the editor that appeared on election day in the Havre Daily News. The publication of these letters, it is alleged, violated Mont. Code Ann. § 13-35-233, which provides in relevant part:

- (1) It is unlawful for a person or a political committee to place an advertisement supporting or opposing a candidate or a ballot issue for use on election day. . .

Violation of this statute is a misdemeanor punishable by a term in the county jail not to exceed 6 months or a fine not to exceed \$1,000, or both.

Mr. Goldstein also alleges that Mont. Code Ann. § 13-35-211, titled "Electioneering--soliciting information from electors" was violated when copies of the June 7th issue of the Havre Daily News were for sale in the Student Union Building (SUB) on the campus of

Northern Montana College. The SUB was a polling place for the primary election. Mont. Code Ann. § 13-35-211 provides, in part:

(1) No person may do any electioneering on election day within any polling place or any building in which an election is being held . . .

Violation of this statute is also a misdemeanor.

SUMMARY OF FACTS

1. Judge John Warner, candidate for reelection to district judge in the Twelfth Judicial District, was opposed by Mr. Mort Goldstein in the June 7, 1994, primary election.

2. A copy of the June 7, 1994, Havre Daily News contained two letters to the editor, both written in favor of Judge Warner. Tom Oberweiser, Billings, Montana, and Kim Kirby, Havre, Montana, were the authors of the letters submitted to the Havre Daily News.

3. Mr. Tom Oberweiser stated that he learned of the race for district judge in Havre in a telephone call from an acquaintance on June 3, 1994, and subsequently wrote the letter that appeared in the Daily News on June 7, 1994.

4. Mr. Kim Kirby wrote his letter to the editor on or about June 3, 1994.

5. Both letters were opinions in favor of Judge Warner. Mr. Oberweiser closed with the phrase "Please vote for John Warner for District Court Judge."

6. The decision about when and where to publish the letters submitted by Mr. Oberweiser and Mr. Kirby was made by the Havre

Daily News. The letters were printed on page 4 under the heading "Opinion."

7. Copies of the Havre Daily News were for sale at the SUB at Northern Montana College. The SUB was used as a polling place for the primary election.

8. Northern Montana College, an independent dealer, regularly sells copies of the Havre Daily News at the SUB, and copies were in sight and for sale inside the building during its use as a polling place.

9. The Havre Daily News failed to publish an ad submitted by Mr. Mort Goldstein on Thursday, June 2, 1994.

10. The Havre Daily News' policy on accepting political ads will not allow any political advertising raising new issues if the opposing candidate will not have an opportunity to respond before the election. Its normal deadline for advertising is 4 p.m. two days prior to publication. This deadline was missed by Mr. Goldstein and extended by the advertising director until 5 p.m. on June 1st. Mr. Goldstein's ad was presented at 7 a.m. on June 2nd and refused because it was late and in conflict with the Daily News' policy on political ads.

11. Other allegations of campaign misconduct do not fall within the authority of the Commissioner, but were considered insofar as they pertain to the alleged violations of Mont. Code Ann. §§ 13-35-211 and 13-35-233.

STATEMENT OF FINDINGS

Letters were written and published in the Havre Daily News on June 7, election day. Mr. Oberweiser and Mr. Kirby, authors of the letters, were expressing their opinions and were both in favor of Judge Warner's candidacy. At the outset it should be emphasized that Mr. Oberweiser and Mr. Kirby could have had no way of knowing if or when their letters would be published. Neither letter was paid for by anyone, but rather both were published according to the policy of the Havre Daily News. Moreover, evidence has not shown any collaborative efforts resulting in the publication of the letters at issue. While it is possible to conjecture about reasons for what happens in a campaign, denials of any complicity charge were uniform and emphatic.

Aside from the lack of any factual support for the complaint, the threshold legal issue is whether the alleged conduct of Judge Warner could under any circumstances be construed as a violation of the statute. The statute clearly prohibits placement of an advertisement for use on election day. Although there is no definition of the term in title 13, Montana Code Annotated, an advertisement is generally defined as a "public notice or announcement, usually paid for, as of things for sale, needs, etc." Webster's New Twentieth Century Dictionary, Unabridged, Second Edition (1979). A letter to the editor of a newspaper is clearly not an advertisement, but is rather an expression of opinion, usually found on the editorial or opinion page of a newspaper.

In Mills v. State of Alabama, 384 U.S. 214 (1966), the United States Supreme Court examined an Alabama statute that provided, in part, as follows:

It is a corrupt practice for any person on any election day to . . . do any electioneering or to solicit any votes . . . for or against the election or nomination of any candidate, or in support of or in opposition to any proposition that is being voted on the day on which the election affecting such candidates or propositions is being held.

The editor of a newspaper was arrested for violating the statute when he ran an editorial on election day urging passage of a particular proposition that was on the ballot. The Supreme Court determined that the statute violated the First Amendment:

We hold that no test of reasonableness can save a state law from invalidation as a violation of the First Amendment when that law makes it a crime for a newspaper editor to do no more than urge people to vote one way or another in a publicly held election.

Mills, 384 U.S. at 220. Certainly a letter from a member of the public, published on the opinion page, would be entitled to similar constitutional protection under the First Amendment.

The availability of newspapers for sale at the SUB was also clearly not a violation of Mont. Code Ann. § 13-35-211. The term "electioneering" is not defined in the statute. This office, however, has adopted an interpretive rule, Mont. Admin. R. 44.10.311:

As used in section 13-35-211, MCA, "electioneering" means the solicitation of support or opposition to a candidate or issue to be voted upon at the election or polling place in question, by means of:

(a) Personal persuasion, electronic amplification of the human voice, or the display or distribution of campaign materials.

(b) Offering or distribution of food, drink, or any other material benefit in a manner calculated to encourage recognition, support, or opposition to a candidate or issue.

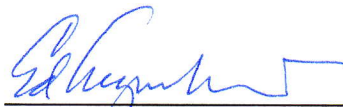
(c) "Electioneering" does not include the display of ordinary bumper stickers on automobiles.

Applying the guidelines in the above-quoted rule, the sale of newspapers at the SUB does not constitute electioneering. There was no "solicitation of support" for a candidate through the mere availability of newspapers for sale. There was no "personal persuasion", no "display or distribution of campaign materials", and no "offering . . . of a material benefit" to support a particular candidacy.

CONCLUSION

Based on the facts and these findings, I conclude that no action is warranted against any of the parties that are the subject of Mr. Goldstein's complaint.

DATED this 19th day of July, 1994.



ED ARGENBRIGHT
Commissioner of Political Practices